

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ATLP, a minor, by and through his Guardian Ad Litem TAYLORIA TAYLOR, et al.,

Case No. 2:21-CV-2072 JCM (EJY)

ORDER

Plaintiff(s),

V.

CORECIVIC, INC.

Defendant(s).

Presently before the court is defendant CoreCivic, Inc.’s *Daubert* motion to exclude Dr. Ryan Herrington’s testimony. (ECF No. 112). Plaintiff Tayloria Taylor, as special administrator of Brandon Patton’s estate and as guardian *ad litem* for minor plaintiffs ATLP and AJP, filed a response (ECF No. 116), to which defendant replied. (ECF No. 128).

Also before the court is defendant's motion for summary judgment. (ECF No. 113). Plaintiffs filed a response (ECF No. 117), to which defendant replied. (ECF No. 129).

Also before the court is plaintiffs' motion for leave to file excess pages. (ECF No. 118).

Also before the court is defendant's motion for leave to substitute Dr. Chad Zawitz's declaration in support of its motion for summary judgment. (ECF No. 127). Plaintiffs filed a response (ECF No. 130), to which defendant replied. (ECF No. 131).

I. Background

This case arises from Patton’s death while he was detained at the Nevada Southern Detention Center (“NSDC”). (ECF No. 1 at 4). The parties are familiar with the facts of the case,

1 and the court will not recite them herein. (*See* ECF Nos. 33; 109). The gravamen of plaintiffs'
 2 complaint is that defendant, the operator of NSDC, failed to provide adequate protection against
 3 COVID-19 infections inside NSDC, resulting in Patton's death. (*See* ECF No. 1).

4 Plaintiff Taylor charged defendant with wrongful death, negligence, gross negligence, and
 5 negligent training and supervision.¹ (*Id.*). Defendant moved to dismiss plaintiffs' complaint.
 6 (ECF No. 14). The court granted defendant's motion and dismissed plaintiffs' claims for gross
 7 negligence and negligent training and supervision. (ECF No. 33).

8 Defendant then moved for judgment on the pleadings. (ECF No. 97). The court granted
 9 that motion and dismissed the wrongful death and negligence claims insofar as they rely on a
 10 theory of direct liability. (ECF No. 109). Thus, the court found that the claims could proceed only
 11 on a theory of vicarious liability. (*Id.*). Defendant now moves to exclude Dr. Herrington's
 12 testimony (ECF No. 112) and moves for summary judgment. (ECF No. 113).

13 **II. Defendant's *Daubert* Motion**

14 **A. Legal Standard**

15 Federal Rule of Evidence 702 controls the court's determination whether to strike a
 16 proposed expert witness:

17 A witness who is qualified as an expert by knowledge, skill, experience, training,
 18 or education may testify in the form of an opinion or otherwise if:

- 19 (a) the expert's scientific, technical, or other specialized knowledge will help the
 20 trier of fact to understand the evidence or to determine a fact in issue;
 21 (b) the testimony is based on sufficient facts or data;
 22 (c) the testimony is the product of reliable principles and methods; and
 23 (d) the expert has reliably applied the principles and methods to the facts of the
 24 case.

25 Fed. R. Evid. 702; see generally *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

26 ¹ The minor plaintiffs joined in all claims except for the negligence cause of action.

1 “Daubert’s general holding—setting forth the trial judge’s general ‘gatekeeping’
 2 obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony
 3 based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co. v. Carmichael*, 526 U.S.
 4 137, 141 (1999).

5 Though the court has broad discretion in discharging its gatekeeping obligation, Daubert
 6 provides a non-exhaustive list of relevant factors for consideration: “1) whether a theory or
 7 technique can be tested; 2) whether it has been subjected to peer review and publication; 3) the
 8 known or potential error rate of the theory or technique; and 4) whether the theory or technique
 9 enjoys general acceptance within the relevant scientific community.” *United States v. Hankey*,
 10 203 F.3d 1160, 1167 (9th Cir. 2000) (citing *Daubert*, 509 U.S. at 592–94).

11 Expert testimony must be relevant and reliable, and it must “relate to scientific, technical,
 12 or other specialized knowledge, which does not include unsupported speculation and subjective
 13 beliefs.” *Guidroz–Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001). Therefore,
 14 exclusion of expert testimony is proper only when such testimony is irrelevant or unreliable
 15 because “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction
 16 on the burden of proof are the traditional and appropriate means of attacking shaky but admissible
 17 evidence.” *Daubert*, 509 U.S. at 596 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)).

18 B. Discussion

19 Defendant moves to exclude Dr. Herrington’s expert report. (ECF No. 112). His report
 20 finds, among other contentions, that Patton’s “ability to survive his detention at NSDC was directly
 21 related to his risk of exposure to COVID-19[,] which CoreCivic failed to responsibly manage.”
 22 (ECF No. 116 at 4).

1 As an initial matter, plaintiffs argue that the *Daubert* motion is a motion in limine, and
 2 defendant failed to meet and confer as required by LR 16-3(a). (*Id.* at 7). LR 16-3(a) does not
 3 include *Daubert* motions. Thus, defendant's motion is not procedurally defective.
 4

5 Defendant first argues that Dr. Herrington's opinions are irrelevant and unhelpful to the
 6 jury. (ECF No. 112). The court disagrees. His opinions are relevant and may help the jury resolve
 7 several factual issues related to any alleged breach of defendant's duty owed to Patton and the
 8 causation of his death. And contrary to defendant's argument, Dr. Herrington's opinions do not
 9 instruct the jury on how it should weigh evidence on the applicable standard of care or causation.
 10

11 Defendant then argues that Dr. Herrington's legal duty and standard of care opinions are
 12 improper. (*Id.* at 13). The court does not find that these opinions risk confusing any issues,
 13 misleading the jury, or unfairly prejudicing defendant. Dr. Herrington merely provides potential
 14 interventions that defendant should have put in place such as COVID-19 testing, hand washing,
 15 and mask use.² (*Id.*, Ex. 1 at 6-7).

16 Defendant also argues that Dr. Herrington is not qualified to opine on protective custody
 17 and other non-medical operational matters. (*Id.* at 14). However, defendant relies on conclusory
 18 arguments and does not offer evidence that Dr. Herrington's opinions are "both unqualified and
 19 unhelpful to the jury." (*Id.* at 15). Thus, Dr. Herrington may opine on these issues.
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21 Furthermore, defendant argues that Dr. Herrington's causation opinions are unreliable and
 22 irrelevant. (*Id.* at 15). Specifically, defendant contends that these opinions are based on
 23 speculation. (*Id.*). Dr. Herrington identifies several actions and inactions that increased the
 24 likelihood Patton would contract COVID-19. (*See* ECF No. 116). His report is not based on
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28 ² Moreover, because the court finds that plaintiffs need not proceed only on a theory of
 29 vicarious liability (*see infra*), defendant's arguments are improper.

1 unsupported speculation, but instead is based on specialized knowledge. *See Guidroz-Brault*, 254
 2 F.3d at 829. Defendant's *Daubert* motion is denied.
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4 **III. Defendant's Motion for Summary Judgment**

5 **A. Legal Standard**

6 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
 7 depositions, answers to interrogatories, and admissions on file, together with the affidavits (if any),
 8 show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment
 9 as a matter of law." Fed. R. Civ. P. 56(a). Information may be considered at the summary
 10 judgment stage if it would be admissible at trial. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir.
 11 2003) (citing *Block v. Los Angeles*, 253 F.3d 410, 418–19 (9th Cir. 2001)). A principal purpose
 12 of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp.*
 13 *v. Catrett*, 477 U.S. 317, 323–24 (1986).

14 In judging evidence at the summary judgment stage, the court does not make credibility
 15 determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most
 16 favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809
 17 F.2d 626, 630–31 (9th Cir. 1987).

18 When the non-moving party bears the burden of proof at trial, the moving party can meet
 19 its burden on summary judgment in two ways: (1) by presenting evidence to negate an essential
 20 element of the non-moving party's case; or (2) by demonstrating that the non-moving party failed
 21 to make a showing sufficient to establish an element essential to that party's case on which that
 22 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
 23 party fails to meet its initial burden, summary judgment must be denied, and the court need not
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1 consider the non-moving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
 2 60 (1970).

3 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
 4 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
 5 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
 6 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
 7 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
 8 versions of the truth at trial.” *T.W. Elec. Serv., Inc.*, 809 F.2d at 630.

9
 10 However, the nonmoving party cannot avoid summary judgment by relying solely on
 11 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
 12 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
 13 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
 14 for trial. *See Celotex*, 477 U.S. at 324. If the nonmoving party’s evidence is merely colorable or
 15 is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby*,
 16 *Inc.*, 477 U.S. 242, 249–50 (1986).

17
 18 **B. Discussion**

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 20 Defendant moves for summary judgment as to plaintiffs’ remaining claims. (ECF No.
 21 113). As an initial matter, the court has authority to correct its findings in the order granting
 22 defendant’s motion for judgment on the pleadings (ECF No. 109). *See United States v. Martin*,
 23 226 F.3d 1042, 1049 (9th Cir.2000).

24
 25 In that order, the court found that plaintiffs’ wrongful death and negligence claims could
 26 proceed only on a theory of vicarious liability. Defendant was incorrect to argue that “a direct

1 liability negligence claim cannot be maintained against an employer where the employer admits
 2 an agency relationship and there is no viable punitive damages claim.” (ECF No. 104 at 5).

3 Defendant misstated the law in *Isaac v. Forcillo*, No. 2:19-cv-01452-KJD-BNW, 2021 WL
 4 5108750 (D. Nev. Aug. 12, 2021). Once vicarious liability is admitted by an employer, and absent
 5 a claim for punitive damages, corporate negligence claims such as negligent training, hiring, and
 6 supervision are legally void—not ordinary negligence claims.³ *Forcillo*, 2021 WL 5108750 at *5.

7 Thus, it was incorrect to find that plaintiffs’ wrongful death and negligence claims could
 8 proceed only on a theory of vicarious liability. *Forcillo*, 2021 WL 5108750 was concerned with
 9 avoiding unnecessary litigation in allowing plaintiffs to proceed on both negligence and negligent
 10 hiring, training, and supervision claims.⁴

11 Therefore, plaintiffs’ wrongful death and negligence claims need not proceed only on a
 12 theory of vicarious liability. And while defendant’s motion for summary judgment has been fully
 13 briefed, the court does not find it necessary to order supplemental briefing.

14 First, plaintiffs challenge the declarations of Dr. Zawitz, Brian Koehn, Bonnie Holley, and
 15 Keith Ivens. (ECF No. 117). They argue that the declarations cannot be considered because they
 16 are improperly authenticated and do not contain a declaration as required by NRS 53.045.⁵ (*Id.*).
 17 The court will disregard these arguments because they have no bearing on the resolution of
 18 defendant’s motion for summary judgment.

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 25 ³ Plaintiffs’ negligent training and supervision claim was already dismissed. (ECF No.
 26 33).

27 ⁴ Moreover, *Forcillo*, 2021 WL 5108750 does not explicitly mention wrongful death
 28 claims.

5 Plaintiffs also challenge the substance of the declarations and their failure to include an
 index of exhibits. (ECF No. 117 at 23-24).

1 However, the court still finds good cause to grant defendant's motion for leave to substitute
2 Dr. Zawitz's declaration. (*See* ECF No. 127). The court also finds good cause to grant plaintiffs'
3 motion to exceed the page limit in response to defendant's motion. (ECF No. 118).
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5 1. Wrongful death

6 As a preliminary matter, defendant is incorrect to analyze plaintiffs' wrongful death and
7 negligence claims together. NRS 41.085 provides that heirs and personal representatives may
8 maintain actions for wrongful death when the death "is caused by the wrongful act or neglect of
9 another." NRS 41.085(2). The court cannot conclude that defendant has met its burden of proving
10 that summary judgment is appropriate. *See Celotex Corp.*, 477 U.S. at 323–24.
11

12 Defendant incorrectly argues that plaintiffs must identify which of its employees engaged
13 in negligent conduct. Here, a reasonable jury could conclude that defendant's wrongful act(s) or
14 negligence caused Patton's death. That includes defendant and its employees' alleged failure to
15 protect against COVID-19 infections, such as the failure to take proper sanitation measures and
16 follow appropriate administrative policies. (*See* ECF No. 117).
17

18 2. Negligence

19 "It is well established that to prevail on a negligence claim, a plaintiff must establish four
20 elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4)
21 damages." *Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1280 (2009) (citing *Turner v.*
22 *Mandalay Sports Entm't, LLC*, 180 P.3d 1172, 1175 (2008)).
23

24 Plaintiffs rely, in part, on Dr. Herrington's report to show that a genuine issue of material
25 fact remains. His report provides that "[Patton's] risk of dying from COVID-19 infection and
26 accordingly his ability to survive his detention at NSDC [were] directly related to his risk of
27 exposure to COVID-19 which CoreCivic failed to responsibly manage because CoreCivic failed
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1 to put in place environmentally related interventions designed to disrupt the previously discussed
 2 epidemiological triangle.” (ECF No. 116 at 4).

3 Questions of negligence and proximate cause are typically questions of fact. *Shepard v.*
 4 *Harrison*, 678 P.2d 670, 672 (1984); *see Nehls v. Leonard*, 630 P.2d 258, 260 (1981). Dr.
 5 Herrington’s report and plaintiffs’ allegations of tortious conduct (*See* ECF No. 117) set forth
 6 specific facts by producing competent evidence, showing a genuine issue for trial. *See Celotex*,
 7 477 U.S. at 324. Thus, defendant’s motion for summary judgment is denied.

8 Moreover, defendant argues that because Patton signed the COVID-19 waiver and chose
 9 to be housed in general population, plaintiffs’ negligence exceeds defendant’s negligence. (ECF
 10 No. 113 at 15). NRS 41.141 states that “[i]n any action to recover damages ... in which
 11 comparative negligence is asserted as a defense, the comparative negligence of the plaintiff ...
 12 does not bar a recovery if that negligence was not greater than the negligence ... of the parties to
 13 the action against whom recovery is sought.”

14 Plaintiffs argue that Patton signed the waiver under duress and the waiver’s language
 15 proves that Patton did not choose to be moved to general population. (ECF No. 117 at 34). The
 16 court cannot conclude, as a matter of law, that Patton was more negligent than defendant. Patton’s
 17 actions create a genuine issue of material fact for trial.

18 **IV. Conclusion**

20 Accordingly,

22 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant’s *Daubert*
 24 motion to exclude Dr. Ryan Herrington’s testimony (ECF No. 112) be, and the same hereby is,
 25 DENIED.

1 IT IS FURTHER ORDERED that defendant's motion for summary judgment (ECF No.
2 113) be, and the same hereby is, DENIED.
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4 IT IS FURTHER ORDERED that plaintiffs' motion for leave to file excess pages (ECF
5 No. 118) be, and the same hereby is, GRANTED.
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7 IT IS FURTHER ORDERED that defendant's motion for leave to substitute Dr. Chad
8 Zawitz's declaration (ECF No. 127) be, and the same hereby is, GRANTED.
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10 DATED March 7, 2025.


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11 UNITED STATES DISTRICT JUDGE